83-577

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LIONTI, FILIPPO and LIONTI, CARMELA
husband and wife, and ROUTE 202
CORPORATION trading as LIONTI'S VILLA,
Petitioners

v.

LLOYD'S INSURANCE COMPANY and
DOMINION INSURANCE COMPANY

BERKLEY CHARLES BERKLEY-PORTMAN,
EXCESS INSURANCE COMPANY,
BELLEFONTE INSURANCE COMPANY, and
DOMINION INSURANCE COMPANY,
Edinburgh, Scotland,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION

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Attorney for Petitioners

QUESTION PRESENTED

Does the invocation of Fifth Amendment privilege against self-incrimination, by a non party witness in a civil case, create any inference impeachable by collateral, hearsay testimony, otherwise inadmissible, which the non offering party is helpless to prevent or mitigate because of lack of opportunity for cross examination [i.e. Should the "permissive inference" rule of Baxter v. Palmigiano , 425 U.S. 308 (1976), be extended to include invocations of the Fifth Amendment privilege by non party witnesses].

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IN THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

The petitioners, Filippo and Carmela Lionti and Route 202 Corporation, trading as Lionti's Villa, respectfully request that a writ of certiorari issue to review the judgement and opinion of the

United States Court of Appeals for the Third Circuit, entered in this proceeding on June 10, 1983.

Please note that Route 202 Corporation has no parent companies and has no subsidiaries, wholly owned or otherwise, but is affiliated with Phillip Lionti and Sons, Inc.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 709 F.2d 237 (1983) and appears in the appendix hereto. The opinion of the United States District Court for the Eastern District of Pennsylvania was not reported but also appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was filed on June 10, 1983. The timely filed petition for rehearing was denied on July 7, 1983. This petition for writ of certiorari was

filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V, U.S.C.A. Const. Amend V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The jurisdiction of the district

court was invoked under 28 U.S.C. §1332, as amended, upon diversity of citizenship of the parties and the amount in controversy exceeding the sum of Ten Thousand ($10,000.00) Dollars.

The facts of the underlying case are that the petitioners herein, sued their insurance company for failure to pay a sum properly due and owing for a fire loss which occurred at Lionti's Villa, an Italian restaurant and lounge. The insurance company defended on the basis that the Liontis were themselves responsible for the fire and the resulting loss. The insurance company counterclaimed for the sum paid to the Liontis' mortgagee pursuant to a mortgage clause in the fire policy. The amount of the counterclaim was $180,000.00.

Pursuant to a jury verdict, the court entered a judgment against the Liontis on their claim and for the insurance company on its counterclaim equal

to the sum of $180,000.00.

The issues in the case on appeal arise in the following context. The defense of the insurance company and the basis of its counterclaim was the bald assertion that the Liontis themselves were responsible for the fire. Circumstantial evidence showing financial difficulty constituted the bulk of the evidence presented to support the claim.

In order to link the Liontis to the fire, the insurance company called to the stand, one Brice J. McLane, Jr., a disgruntled former employee of the Liontis.

After taking the stand, the former employee refused to answer certain questions and claimed the privilege of the Fifth Amendment. The court held the assertion of the Fifth Amendment proper by the witness, and permitted the party calling that witness to thereafter call its own agent as a collateral witness to impeach the earlier witness who invoked the

privilege. The collateral witness testified to earlier statements of the invoking witness inconsistent with the invocation of the privilege. More specifically, the statements elicited from the collateral witness can best be described as the collateral witness's testimony of what the invoking witness said that the Liontis said with regard to information on how to start a fire. This statement containing hearsay within hearsay, and like statements came into evidence over objection and constituted the only evidence in the trial that could be considered direct evidence compared to the completely circumstantial evidence constituting the bulk of the remainder of the insurance carriers' case.

In effect, the trial court held that the jury could draw an inference from the invocation of the Fifth Amendment privilege which inference could be negated by the testimony of a collateral witness.

Inconsistently, the trial court later charged the jury that they were not to infer anything adverse to either the plaintiffs or to the defendants by reason of the privilege claimed by the invoking witness.

The decision of the district court is affirmed in the majority opinion of the United States Court of Appeals. The court asserts that it is not necessary to decide whether or not the invocation of the Fifth Amendment privilege of a non party witness in a civil case has evidentiary value. This assertion is made despite the fact that the testimony of the collateral witness was objected to in total at trial and was the sole subject matter of the appeal.

Furthermore, the posture of the contested statements in the record causes there to be an implied holding that the invocation of a Fifth Amendment privilege by a non party witness in a civil case

creates an inference and has evidential value despite the court of appeals statement to the contrary.

REASON FOR GRANTING THE WRIT

The court of appeals has by implication decided an important question of federal law which has not been, but should be, settled by this court [i.e. Should the "permissive inference rule" of Baxter v. Palmigiano , 425 U.S. 308 (1976) be extended to include invocations of the Fifth Amendment privilege by non party witnesses].

The above important question of federal law should be settled by this court for several reasons. Although Baxter is correct on its facts, it presents a great injustice when applied to invocations of non party witnesses. Secondly, prior to the case at bar, no federal appellate court has ever addressed the issue and it is necessary that advocates have clear guidelines in applying constitutional

standards in the court room. Lastly, the holding of the case at bar, if permitted to stand, will encourage trial tactics.

In Baxter , the court held that the invocation of the Fifth Amendment privilege by a party witness in a civil case has evidential import and may constitutionally give rise to an adverse inference. Thereby, the court limited Griffin v. California , 380 U.S. 609 (1965), which banned drawing inferences from invocation of Fifth Amendment privilege, to criminal cases only. The permissive inference against a civil party is based at least in part on the long held theory that silence in the face of uncontradicted adverse evidence constitutes an admission. This is because a party has a duty to come forward with evidence. The penalty for not coming forward might be the allowance of an adverse inference. /1 Justification also exists by virtue of the fact that in a civil case the invocation enables

defendants to resist discovery and thereby retard the progress of litigation with attendant increases in costs and time spent. Heidt, The Conjure's Circle: The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062 (1982).

It should be noted that the right to draw an inference adverse to a party witness is not unlimited. There must be a prima facia case established by the person seeking to draw the inference and that prima facia case must be established independently of the use of the inference. The penalty cannot be imposed solely by reason of the exercise of the privilege. Lefkowitz v. Cunningham , 431 U.S. 801, (1977); Garrity v. New Jersey , 384 U.S. 493 (1967). /2

The permissive inference makes far less sense when applied to a non party invocation. As compared to a party, a witness has no stake in the proceedings. Furthermore, if the non party invokes the

privilege, that invocation cannot be used against him in any later proceeding. Lowenberg v. Merchants and Mechanics Bank , 144 Ga. 556, 87 S.E. 778 (1916); Hall Motor Freight v. Montgomery , 357 Mo. 1188, 212 S.W.2d 748 (1948). With that protection he has the purely personal choice of whether or not to invoke the privilege as he is completely free of the control of the non calling party. There is no requirement that the witness justify his fear of self-incrimination. The witness may not be cross examined on his reasons for invoking the privilege. Bowles v. United States , 439 F.2d 536, 542 (D.C. Cir. 1970) (en banc) cert. denied, 401 U.S. 995 (1971). The witness invoking the privilege suffers no loss of rights. On the other hand, the party, against whom the collateral evidence will be used, has lost the right of cross examination. 8 Wigmore, Evidence 439 (McNaughton ed. 1961).

The attack upon the creation of

permissive inferences as the result of the invocation is most clearly stated in the federal criminal cases. The refusal to allow an inference rests on the fact that reliable inferences do not ordinarily follow from the invocation of the Fifth Amendment. Usually several inferences are possible. Some may be helpful to either side, conceivable or inconceivable, likely or unlikely, but none of them can be inquired into by cross examination and all possess weak probative value. Neither side should be entitled to advantages from the inferences the juries may draw. Furthermore, the impact is disproportionate to its significance because jurors see it as "high court room drama." United States v. Lacouture , 495 F.2d 1237 (5 Cir. 1974); United States v. Johnson , 488 F.2d 1206 (1st Cir. 1973), cert. denied, 419 U.S. 1053 (1974).

In the interest of fairness, the holding in Baxter should be limited to

party witnesses.

Also important is the fact that prior to the case at bar, no federal appellate court has squarely addressed the issue of permissive inference raised here. The case at bar has by implication provided authority for advocates to argue both sides of the issue.

Several state appellate courts have addressed the issue squarely and have found no permissible inference where a non party witness invokes the Fifth Amendment privilege. /3

On the other hand, some federal district courts have allowed the civil non party invocation to have evidential import. /4

The most pressing reason for the need for United States Supreme Court review of the case at bar is the potential for trial tactics which this case makes possible. A witness should not be put on the stand for the purpose of invoking the

privilege because this is an invitation to the jury to draw an unfounded inference. The calling of a witness for the value of his refusal to testify is a practice often condemned in the area of criminal trials. See, e.g. United States v. Lacouture , supra. Basically the non calling party is unable to defend against an adverse inference drawn against a witness for the otherside because he has no control over the witness being called and there is no opportunity for cross examination. Lastly, whether the invocation is proper must be determined by the judge. The jury may not guess. Furthermore, the judge must make the determination from the question alone. Hoffman v. United States , 341 U.S. 479, 486 (1951). In cases such as the one at bar, the jury and not the judge would be passing on the propriety of the invocation of the Fifth Amendment privilege. The writ should be granted in this case to permit the court to settle this important question

of federal law.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the writ for certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

FOOTNOTES

1. Morrison Commentary: Availability of Fifth Amendment Privilege against Self-Incrimination and the Permissibility of Drawing Adverse Inferences: Alternative Perspectives, 48 A.B.A. Anti-trust L.J. 1421 (1980);

Ratner, Consequences of Exercising the Privilege against Self-Incrimination, 24 U. Chi. L. Rev. 472 (1957);

2. Moxham, A comment Upon the Effect of Exercise of One's Fifth Amendment Privilege in Civil Litigation, 12 New Eng. L. Rev. 265 (1976);

3. Masterson v. St. Louis Transit

Co., 204 Mo. 507 , 103 S.W. 48 (1907);

Waer v. Waer , 90 Atl. 1039 (N.J. Ch. 1914);

Hinds v. John Hancock Mutual Life Ins. Co. , 155 Me. 349, 155 A.2d 721 (1959);

Commonwealth v. Ries , 337 Mass. 565, 150 N.E. 2d 527 (1958);

4. Brink's Inc. v. City of New York , 539 F. Supp. 1139, 1141-42 (S.D.N.Y. 1982);

Poplar Grove Planting & Refuring Co. v. Bache Halsey Stuart Inc. , 465 F. Supp. 585, 591 (M.D.La. 1979);

E.H. Boerth Co. v. LAD Properties , 82 FRD 635, 694-645 (D. Minn. 1979);

Respectfully submitted,

NELSON J. SACK

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

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husband and wife, and ROUTE 202
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Edinburgh, Scotland,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1659

LIONTI, FILIPPO and LIONTI, CARMELA,
husband and wife, and ROUTE 202
CORPORATION trading as LIONTI'S VILLA

v.

LLOYD'S INSURANCE COMPANY, and
DOMINION INSURANCE COMPANY

BERKLEY CHARLES BERKLEY-PORTMAN,
EXCESS INSURANCE COMPANY,
BELLEFONTE INSURANCE COMPANY, and
DOMINION INSURANCE COMPANY,
Edinburgh, Scotland

Filippo Lionti and Carmela Lionti,
husband and wife, Route 202
Corporation t/a Lionti's Villa
and/or The Italian Villa,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Civil Action No. 79-2034)

Argued December 16, 1982

Before: HUNTER and GARTH, Circuit Judges
and STERN, District Judge*

(Opinion Filed June 10, 1983)

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OPINION OF THE COURT

GARTH, Circuit Judge.

This appeal presents for our review two claimed evidentiary errors which occurred during a thirteen-day trial. The plaintiffs Filippo and Carmela Lionti ("Lionti") contend that these two alleged errors should result in the grant of a new trial. We cannot agree.

On September 20, 1978, The Italian Villa, a restaurant and bar owned by Lionti, burned to the ground. Lionti brought this action against the insurer /1 after the insurer disallowed his claim for policy proceeds. The insurer refused Lionti's claim on the ground that Lionti set or procured the setting of the fire. The jury returned a verdict in favor of the insurance company. Lionti appeals from an order of the district court denying his motion for a new trial. /2 Because we find no error affecting a substantial right of the parties, we affirm.

I.

The Italian Villa was a single story stone structure with a full basement containing a restaurant and bar. At roughly 5:00 a.m. on September 20, 1978, a violent explosion erupted in the building, shattering windows in a house nearby and catapulting debris over 100 feet away.

On November 16, Lionti submitted proofs of loss to his insurance company. These proofs of loss asserted losses of $266,606 for the building itself, $114,256 for its contents, $83,850 for interruptions of business income, and affirmed that the origin of the fire was "unknown to assured." Lionti initiated this action on June 6, 1979, claiming that the insurer had not reimbursed Lionti for the losses sustained, although the insurer had paid Lionti's mortgagee, the First Mortgage Company of Pennsylvania, $180,000 under the policy's loss-payable clause. On September 21, the insurer counterclaimed against

Lionti for $180,000, the loss paid to First Mortgage, as subrogees of First Mortgage's rights. The case proceeded to trial on February 13, 1980.

A.

Evidence adduced at trial was overwhelming that the September 20 fire had been set intentionally. Firemen entering the structure found gasoline vapors in the basement so strong that they were unable to remain in the building. Burn patterns on the floor of the restaurant indicated that the fire had been spread by a flammable liquid. Inside the restaurant's kitchen door lay an extension cord plugged into a wall outlet and terminating in an electric charcoal lighter; lying beneath the charcoal lighter were two plastic containers smelling of gasoline. Firefighters removed from the building these two containers and three others; laboratory tests proved at least four of these five containers to contain gasoline.

Carpeting and debris throughout the restaurant were also impregnated with gasoline. In the opinion of several experts, the magnitude of the explosion, the residue of gasoline and location of gasoline containers, and the presence of an electric starter coil left little doubt that the fire was of incendiary origin.

Evidence that Lionti was responsible for the fire was also compelling, although largely circumstantial. The evidence of Lionti's complicity fell into three categories.

First, testimony indicated that the Italian Villa was financially troubled during the months before the fire. Sales during the months of August, 1978, were $16,324, substantially less than the August 1977 sales of $25,586. Sales during the nine months preceding the fire were only $133,000, again considerably less than the prior nine months' sales of $217,000. Based on Lionti's corporate 1978 tax

return, an expert estimated Lionti's yearly expenses at $84,000; Lionti had available cash, however, of only $58,000, resulting in a cash flow shortage of $26,000. Nine checks issued by Gina Lionti, daughter of Filippo and Carmela, in August and September of 1978 were returned for insufficient funds. By August of 1978, the Italian Villa had fallen behind in payments to at least seven creditors, including three banks or savings and loans associations. Real estate, sales, and payroll taxes for the 1977 tax year were all delinquent.

Second, nine days before the fire, the First Mortgage Company of Pennsylvania notified Lionti that First Mortgage intended to call in a loan of $392,000 and foreclose on its security interests, including the restaurant and Lionti's liquor license. Five days before the fire, Lionti entered into an oral agreement with First Mortgage stipulating that the

restaurant would be put up for sale by September 25, and would be sold within ninety days thereafter. On Tuesday, September 19, Lionti was to sign documents memorializing this agreement. No agreement was ever signed. On Wednesday, September 20, the Italian Villa burned to the ground.

Third, several arrangements concerning Lionti's insurance raise strong inferences of Lionti's involvement in the September 20 fire. On September 12--one day after First Mortgage notified Lionti of its intention to foreclose--Gaetano Lionti, son of Filippo and Carmela, approached an insurance agent and sought to purchase an additional $500,000 of fire insurance for the restaurant. After the fire, the agent reported this solicitation to the Pennsylvania fire marshal on his own accord. Asked why he approached the fire marshal, the agent explained, "Well, it's rather unusual when somebody requests a large amount of fire insurance in addition

to what they may already have and then a couple of days later there is a fire." In addition, on September 14, Gina Lionti appeared in the office of Lionti's insurance agent and--for the first time in a two-year history of delinquent payments--prepaid three months' insurance premiums in advance of the date payment was due.

In the opinion of the insurer's expert, these facts, coupled with the absence of any indication of forcible entry, evidence that only Lionti had keys to the building and the alarm system, the early morning hour of the fire, and the absence of indicators that the fire had been set for revenge, fell "into a classic pattern of insurance fraud fire."

For his part, Lionti maintained that the fire harmed rather than assisted him financially, suggesting an absence of motive, /3 and implied that the insurer colluded with First Mortgage to recover

that McLane, and not Lionti, started the fire the insurer called McLane to testify. Asked whether McLane recalled an argument or discussion with Gina Lionti during the summer of 1978, McLane asserted the fifth amendment privilege against self-incrimination. Nevertheless, taking what counsel for the insurer, David Strawbridge, characterized during oral argument as "a calculated risk," Strawbridge pressed on with additional questions. McLane denied threatening to harm Lionti or to burn, dynamite, or destroy the restaurant. However, in answer to the following question--"Did you have anything to do with setting the fire, Mr. McLane?"--McLane responded, "I refuse to answer that question on the grounds it may tend to incriminate me." /5

Strawbridge immediately approached the bench and informed the court that only an hour or so earlier, McLane had told Strawbridge and the insurer's investigator,

from Lionti, moneys that the insurer owed First Mortgage as a loss mortgage payee named in the policies. /4 In addition, Lionti suggested that a disgrunted employee, Brice McLane, may have ignited the fire in revenge for his discharge from employment. The issues presented by this appeal arise principally as a consequence of McLane's testimony.

B.

McLane had been hired by Lionti in July or August of 1978 to promote business. After several disputes with McLane over a bartender, McLane was paid $300 for his services and was discharged. The district court permitted Gina Lionti to testify to several declarations of McLane suggesting motive of revenge. According to Gina, McLane stated, "No, she [the bartender] don't go. She's got to stay here....Things are going my way, otherwise I will blow up the whole place with dynamite."

In order to rebut the inference

William Miller, that McLane "did not have anything to do with the setting of the fire." Strawbridge consequently sought a ruling that McLane be compelled to answer. Accordingly, the district court excused the jury and conducted a hearing on the admissibility of McLane's testimony.

McLane proceeded to confirm that he told Strawbridge and the investigator, Miller, that McLane was not involved in the fire. The court thereupon ruled that the insurer would be permitted to plead surprise and impeach the inference drawn from McLane's assertion of the fifth amendment privilege. In particular, the court ruled that McLane could be asked whether, within the previous hour, McLane told Strawbridge and Miller that he, McLane, had nothing to do with the fire. If McLane answered this question in the affirmative, the court ruled, McLane could then be asked whether this prior statement was true. Finally, the court ruled that

McLane had not waived the fifth amendment privilege by virtue of any statements made to Strawbridge and Miller.

Still out of the presence of the jury, Strawbridge asked the questions authorized by the court. McLane confirmed that he told Strawbridge and Miller several hours earlier that he, McLane "had nothing to do with the fire." Strawbridge thereafter proposed to question McLane along these lines in the presence of the jury. The court agreed, but directed counsel "not to ask [McLane] questions where he has said he will invoke his privilege."

Before the jury, McLane again denied threatening Lionti. Strawbridge then asked whether McLane recalled "me asking you if you were in any way connected with the fire, involved with the fire." McLane responded, "I refuse to answer on the grounds it would intend to incriminate me." Strawbridge did not ask the court to

compel an answer to this question.

Thus thwarted in his desire to impeach McLane by eliciting from McLane a prior statement inconsistent with McLane's reasserted privilege against self incrimination, Strawbridge called the investigator, Miller, to the stand. Counsel for Lionti objected to Miller's testimony in total. /6 During a hearing on the admissibility of Miller's testimony, Miller related that McLane told Miller that McLane had been approached by Gaetano Lionti with questions concerning how one would set a fire. According to Miller, McLane reported that he had sketched on a napkin the plan for a fire that "could cause the total destruction of the building." Miller also proposed to recite the contents of McLane's remarks made in the corridor to the effect that McLane had nothing to do with the fire, and proposed to testify that McLane sought to obtain money in exchange for favorable testimony first from the insurer,

and then from Lionti.

At the conclusion of Miller's voir dire, the court permitted Miller to testify only for the purpose of "impeach[ing] statements made by Mr. McLane that would be inconsistent with statements he made to Mr. Miller." Before the jury, Miller testified to McLane's remarks in the corridor to the effect that McLane was not ilnvolved in the commission of the fire. Strawbridge offered Miller's account of McLane's remarks not for the truth of the matter asserted, but for the fact that McLane made them and that they were inconsistent with McLane's subsequent assertion of the fifth amendment privilege.

Miller also testified to two other out-of-court declarations of McLane. Asked what McLane told Miller "with respect to his interest in compensation [from the insurers] as concerned his testimony," Miller replied:

"He indicated to me that he had information concerning the cause and origin of the fire

and he had information concerning questions that had been brought to him by members of the Lionti family concerning the fire, concerning how someone would set a fire." The court sustained Lionti's objection to this answer, granted Lionti's motion to strike, and instructed the jury "to disregard it."

Asked about McLane's offer to Lionti to give favorable testimony in exchange for money, Miller began to relate that McLane stated he had information that would "wrap the case up for the insurance company." Before Miller could utter the words, "wrap the case up for the insurance company," the court admonished Miller to stop speaking. Nevertheless, the court later permitted Miller to testify, over Lionti's objection, to McLane's assertion that McLane's information would "wrap the case up for the insurance company and the Liontis were not dumb and they would be willing to make a deal." The court did not, however, permit Miller to relate the substance of the information that, in

McLane's words, would "wrap the case up for the insurance company."

At the conclusion of Miller's testimony, the court instructed the jury that Miller's testimony could be used only to impeach McLane's credibility, an instruction reiterated during the court's charge to the jury. /7 The district court also charged that McLane's assertion of the privilege against self-incrimination "is to have no evidentiary value at all." See note 9 infra.

The jury returned a verdict in favor of the insurance company. The court denied Lionti's subsequent motion for a new trial or for a judgment notwithstanding the verdict, noting that "[a]lthough the defendants' case relied exclusively on circumstantial evidence, it was of more than sufficient volume and weight to justify the finding that the Liontis had set the fire or caused it to be set."

II.

Lionti's brief on appeal raises only two issues. Both concern Miller's testimony. Neither concerns McLane's assertion of his fifth amendment privilege. /8 First, Lionti seeks a new trial based on Miller's account of McLane's statement that questions "had been brought to [McLane] by members of the Lionti family concerning....how someone would set a fire." The district court granted Lionti's belated objection and motion to strike. Nevertheless, Lionti argues that the court's instruction to disregard this statement did not purge the trial of prejudice.

Second, Lionti maintains that Miller's recitation that McLane had evidence that would "wrap the case up for the insurance company," and for which Lionti "would be willing to make a deal," requires a new trial. The clear inference, Lionti asserts, "is that the Liontis would pay McLane to keep quiet because the

Liontis had started the fire" (Appellants' Brief, at 13-14). Lionti argues that by so testifying, Miller violated the district court's admonition not to disclose the contents of the information McLane possessed that would "wrap the case up for the insurance company." In addition, Lionti claims that McLane's outburst in this respect requires a new trial.

III.

We need dwell only briefly on Miller's account of McLane's offers to "sell" favorable testimony. As Lionti properly observes, the first of Miller's contested statements--relating McLane's out-of-court declaration that Lionti approached McLane with questions "concerning how someone would set a fire"--was hearsay. Because the district court granted Lionti's motion to strike and instructed the jury to disregard this statement, we must ask whether Miller's statement was so prejudicial as to require

a new trial.

"The general rule is that if evidence which may have been taken in the course of a trial, be withdrawn from the consideration of the jury by the direction of the presiding judge, that such direction cures any error which may have been committed by its introduction." Throckmorton v. Holt , 180 U.S. 552, 567 (1901). In addition, we are instructed by Fed. R. Civ. P. 61, and by 28 U.S.C. §2111 (1976), that no error or defect shall be ground for granting a new trial "unless refusal to take such action appears to the court inconsistent with substantial justice." See Mercer v. Theriot , 377 U.S. 152, 154 (1964) (per curiam); Warrick v. Brode , 428 F.2d 699 (3d Cir. 1970) (per curiam).

The district court found that evidence of Lionti's complicity in the fire was, although largely circumstantial, "overwhelming," App. at 162, and we cannot

disagree. Evidence that Lionti sought to purchase an additional $500,000 of fire insurance nine days before the fire and one day after First Mortgage communicated its intention to foreclose, and that Gina Lionti, for the first time in two years (and six days before the fire), tendered an insurance premium before it was due, was more than ample to link Lionti to the fire. We are satisfied that this single unresponsive outburst by Miller, in the context of a thirteen-day trial, followed immediately by the court's curative instruction, did not affect the jury's verdict.

Miller's second statement--recounting McLane's suggestion that McLane had information that would "wrap the case up for the insurance company"--is charged by Lionti to violate the district court's earlier ruling not to disclose the substance of McLane's remarks, and to be so prejudicial that reversal of

the jury verdict is required. First, our reading of the record discloses that the district court's admonition was not breached. Miller did not reveal the substance of McLane's information that would "wrap the case up for the insurance company."

Second, in order to appreciate the context in which this statement was made, it must be remembered that the insurance company had called McLane as a witness to testify that he, McLane, had stated to Miller that McLane "did not have anything to do with the setting of the fire." McLane, however, had remained silent, and the district court did not compel him to testify. In its final istruction to the jury, the court instructed that McLane's "exercise of his constitutional privilege [had] no evidentiary value at all." /9

Thus, to the extent that the district court removed from the jury's consideration McLane's claim of privilege,

Miller's testimony as to what McLane had told him--that McLane "did not have anything to do with the setting of the fire"--was hearsay.

In light, however, of the overwhelming evidence adduced during trial, we are satisfied that Miller's statement, while erroneously admitted, was harmless. See Fed. R. Evid. 103(a). /10 While the court admitted Miller's testimony erroneously in this one respect, it was not error to admit Miller's testimony which related to McLane's eagerness to "sell" information first to the insurance company, and then to Lionti. McLane's willingness to sell his information was available for legitimate consideration by the jury in assessing his credibililty.

Thus, we find no error in the admission of this segment of Miller's testimony. Furthermore, we are satisfied that even were it otherwise, Miller's later testimony, even in combination with his earlier one-sentence out burst, would

constitute harmless error under the standard previously addressed, and would therefore be insufficient to warrant a new trial.

IV.

The March 6, 1981 order of the district court will be affirmed.

FOOTNOTES

1. The defendants Charles Berkley-Portman, representing a number of individual insurers known colloquially as Lloyd's of London, and the Dominion Insurance Co., issued policies of insurance covering the property which the parties stipulate were "in full force and effect subject to all [their] terms and conditions at the time of the loss. The defendants are identified hereinafter as the "insurer" or "insurance company."

2. Although the order of the district court from which Lionti appeals denies Lionti's motion both for a new trial and for judgment notwithstanding the verdict, the record does not disclose a motion for directed verdict at the close of the evidence. The denial of Lionti's motion for judgment notwithstanding the verdict is therefore not before us. Fed. R. Civ. P. 50(b); see Lowenstein v. Pepsi-Cola Bottling Co ., 536 F.2d 9, 10-12 (3d Cir.), cert. denied, 429 U.S. 966 (1976).

3. Lionti's loan agreement with First Mortgage included a prepayment penalty clause. According to Edward Sicles, president of First Mortgage, the settlement between First Mortgage and the insurer constituted a "prepayment" exposing Lionti to a prepayment penalty. In addition, Lionti's proofs of loss for those claims respecting the contents of the building and business interruption exceeded

the policy limits of $50,000.00.

4. On April 12, 1979, the insurer and First Mortgage executed a "release and agreement of assignment," according to which the insurer agreed to pay First Mortgage $180,000 under the policy's loss-payable clause. This payment formed the basis for the insurer's counterclaim against Lionti. First Mortgage, in turn, released the insurer from all claims due under the policy. The agreement recited that First Mortgage "intends to exercise its rights of foreclosure"; the agreement also included a formula permitting the insurer to share in moneys obtained by First Mortgage as the result of a foreclosure. Because First Mortgage held security interests in properties other than the restaurant, and because Lionti owed First Mortgage considerably more than $180,000, First Mortgage anticipated foreclosing on additional property. The insurer, in turn, anticipated sharing in

this income, and thereby recouping some, if not all, of the $180,000 paid over to First Mortgage. Lionti hoped the jury would draw an inference that as a result of a sweetheart deal between the insurer and First Mortgage, the insurer had nothing to lose, and much to gain, by disclaiming liability.

5. McLane testified that he had retained counsel in Delaware who "was not available to come with me today on such short notice," and who had advised McLane to "take the Fifth Amendment on any questions concerning my involvement in the fire." McLane informed the court that he had been arrested for charges growing out of the fire and was under investigation by the Treasury Department for possible involvement in the fire.

6. Counsel objected as follows:

MR. SEIGLE: Your Honor, do I object on the record at this point? Because, you know, I object to the whole

line of testimony of this witness with respect to his testimony as against the witness yesterday, Brice McLane.

7. The district court charged as follows:

[Y]ou are not to use anything that William Miller said about his prior conversation with Brice McLane to establish what Brice McLane actually said, or to establish any fact for one side or the other. The only purpose for Mr. Miller's testimony was that of discrediting Brice McLane as a witness, if in fact you think that it did discredit him.

8. Although in text we have set forth, in some detail, the evidentiary development giving rise to the two claims of error now asserted by Lionti, we have done so only to place Miller's testimony, challenged by Lionti, in its proper context. Thus, it must be remembered that despite the evidentiary setting which

resulted in Miller's testimony, Lionti in this appeal has never asserted any error based on McLane's claim of a fifth amendment privilege. Indeed, while Lionti advanced an argument on this point to the district court in a post-trial motion, it has evidently been abandoned on appeal. Our disposition of this appeal makes it unnecessary to address this issue. See note 10 infra.

9. The district court charged as follows:

> There is one more thing you should bear in mind with regard to this particular witness Brice McLane. He exercised his privilege against self-incrimination. That was his right and you are not to infer anything adverse to either the plaintiffs or anything adverse to the defendants by reason of what Brice McLane did. There may very well be a

myriad of reasons why he would choose to exercise his privilege against self-incrimination, and it would be improper for you to make any assumption or to try to guess or to surmise or puzzle out why he chose to exercise that privilege. Accordingly, you are directed that Brice McLane's exercise of his constitutional privilege is to have no evidentiary value at all.

10. Thus, contrary to the dissent's argument, we do not address the issue whether McLane's exercise of a fifth amendment privilege has evidential value.

DISSENTING OPINION

STERN, District Judge, dissenting.

Whether there is evidential value in a non-party witness's invocation of fifth amendment privilege in a civil case is an issue no court of appeals has ever

squarely addressed. Today the majority makes a muscular attempt to avoid being the first to speak. Despite its insistence on non-decision, however, the majority implicitly answers the question affirmatively. I am therefore unable to join its decision.

The trial court ruled that McLane's assertion of fifth amendment privilege was proper, and then permitted the insurance company to call Miller, its own agent, as a collateral witness for the sole purpose of "impeaching" McLane's invocation of privilege. /1 Counsel for the insurance company readily admitted at oral argument that Miller was called in order to impeach McLane's refusal to testify, and the majority notes that Miller's testimony was offered "not for the truth of the matter asserted, but for the fact that McLane made [the statements] and that they were inconsistent with McLane's subsequent assertion of the fifth amendment

privilege." /2 Typescript at 11.

A few days later, the trial court reversed itself in its charge to the jury, and instructed that the assertion of the fifth amendment has no evidential worth. See Typescript at 16 n.9. In spite of the fact that the trial court thus made rulings flatly inconsistent with each other as to the evidential content of the invocation of the fifth amendment, the majority insists that it is not necessary to resolve this confusion. Instead, the majority professes to limit its holding by stating that it is not ruling on the fifth amendment evidential question, but only on the error produced by allowing portions of Miller's testimony on a basis inconsistent with subsequent jury instructions.

There can be no dispute that the trial court either committed error in originally permitting the inference and its rebuttal, or that it committed error in ruling in its final instruction that no

inference can be drawn. It can not be right as to each. The majority's refusal to say which is correct authorizes both, and hereafter leaves to the trial court's discretion the decision whether or not to allow an inference to be taken from a non-party witness's invocation of fifth amendment privilege. /3 In my view, this is grave error for two reasons: it transposes the determination as to the propriety of invoking privilege from judge to jury, and it imparts evidential value to the assertion of the fifth amendment.

In general, the invocation of the fifth amendment prilvilege is without evidential content. Certainly in the criminal setting this is so, where it is understood that,

"The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive

presumption of perjury. As we pointed out in Ullmann v. United States, 350 U.S. 422, 426-29 (1956)], a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

Slochower v. Board of Higher Education, 350 U.S. 551, 557-58 (1956) (citing Griswold, The Fifth Amendment Today (1955)). Accord Grunewald v. United States, 353 U.S. 391, 421 (1957). This follows from the fact that in order to invoke the privilege it is only necessary that from the question alone it is not possible to say that an answer would not incriminate or even furnish a "link in the chain of evidence needed to prosecute the claimant for a federal crime." Hoffman v. United States, 341 U.S. 479, 486 (1951) (citing Blau v. United States, 340 U.S. 159

(1950)). Accord United States v. Lowell , 649 F.2d 950, 963-64 (3d Cir. 1981) (citing United States v. Burr , 25 F. Cas. 38 (C.C.D. Va. 1807) (No. 14,692e) (Marshall, C.J.), where "link in the chain" test first announced); United States v. Coeffey, 198 F.2d 438, 440 (3d Cir. 1952). Since the judge must determine the propriety of the invocation from the question alone, it is

impossible to make meaningful inferences from the invocation of this privilege. The judge must act blindly; he may not speculate or infer what the actual answer is. His ruling permitting the refusal to testify cannot authorize a jury to infer what the answer might have been. In the setting of a courtroom, a witness may have many reasons for refusing to give testimony. Under the fifth amendment test, once a witness invokes privilege it is nigh to impossible to determine why he has done so, or to overrule his refusal. Just as

courts can never be comfortable that in upholding the invocation they truly vindicate the privilege, juries are left with nothing but rank speculation in attempting to draw inferences from such an event.

In only one limited context have courts accorded the refusal to testify with evidential import: the invocation of the fifth amendment by parties in civil litigation. See Baxter v. Palmigiano , 425 U.S. 308, 318 (1976). /4

The reasoning behind this exception, although less than satisfying, would appear to be that this is a necessary toll exacted from civil litigants who might otherwise use the privilege as a weapon against the oposing side. Allowing inferences to be drawn from a party's invocation of the fifth amendment is, in this view, a transaction cost of litigation whose potential harshness is mitigated by the ability of a party, through counsel, to

explain the control the contours of his invocation. See, e.g., Heidt, The Conjurer's Circle: The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062 (1982); Note, Plaintiff as Deponent: Invoking the Fifth Amendment, 48 U. Chi. L. Rev. 158 (1981); Daskal, Assertion of the Constitutional Privilege Against Self-Incrimination in Federal Civil Litigation: Rights and Remedies, 64 Marq. L. Rev. 243 (1980); Kaminsky, Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis, 39 Brooklyn L. Rev. 121 (1972); Ratner, supra at 5 n.4. /5

To the extent that these concerns exist where parties are involved, none are implicated when a mere witness, with no stake in the matter, invokes privilege. Provided that such behavior is not the responsibility of either party, it does not work any unfairness which requires

penalization. To the contrary, it is by allowing inferences from witness's refusal to testify that one party will be harmed, and in a manner that is beyond his power to control. While a party may be able to deflect the damage of adverse inferences taken from his own invocation through, for example, rehabilitating examination by his counsel, he is unable to defend against an adverse inference drawn against a witness which in turn harms his own case.

If we extend Baxter to include civil witnesses, we thereby approve of trial tactics I had until today thought impermissible. If the invocation of the fifth amendment is an evidential event, nothing prevents a civil party, or for that manner a criminal defendant, from calling a witness to the stand, with the sole and

express purpose of having the jury hear the witness invoke a fifth amendment privilege and draw an inference. This practice has been condemned, however, with respect to calling of witnesses by criminal defendants, see, e.g., United States v. Lacouture , 495 F.2d 1237, 1240 (5th Cir.) (quoting United States v. Johnson , 488 F.2d 1206, 1211 (1st Cir. 1973)), cert. denied, 419 U.S. 1053 (1974); Bowles v. United States , 439 F.2d 536, 542 (D.C. Cir. 1970) (en banc), cert. denied, 401 U.S. 995 (1971), and I see no distinction as applied to civil parties. See also American Bar Association Project on Standards for Criminal Justice, Standard 4-7.6(c) (a lawyer should not call a witness who he knows will claim a valid privilege not to testify). Moreover, in certain instances such as that before us, the majority's implicit holdilng would permit the jury, rather than the judge, to determine the propriety of the invocation

itself. In this case, for example, the trial court initially--and erroneously--considered that the jury could legally draw an inference that McLane had set the fire from McLane's invocation of privilege. Then, in permitting the defense to negate this inference with Miller's testimony, the court allowed the jury to retry the issue of the propriety of the invocation itself. It thus shifted the final responsibility for determining the propriety of the invocation from court to jury. There can be no doubt that this displacement of functions is impermissible. What the court should have done when McLane refused to answer was immediately to give the instruction it reserved for the end: that the jury should disregard McLane's invocation because it possessed no evidential worth.

The trial court's decision to admit Miller's testimony, inconsistent with its own belated instruction as well as

articulate fifth amendment analysis, was error. Had the majority admitted the source of this error, but held that error harmless, there would be no occasion for disagreement. But an appellate holding that invites future juries to weigh the evidential worth of fifth amendment invocations, and that authorizes future advocates to call witnesses for the value in their refusals to testify, compels this dissent.

FOOTNOTES

1. The court ruled that impeachment of McLane was proper in order to "negative[] the unfavorable inference [McLane] may have created by his refusal to testify," App. at 54, and stated that "the only purpose of [Miller's] testimony is to impeach any inference that might have been drawn from Mr. McLane's testimony." App. at 86-87. It should also be emphasized that the circumstances leading to the

invocation from which the allowed inference was drawn were entirely of defendant's creation. Very early in his direct examination, in response to a question concerning only a conversation between Gina Lionti and him, McLane invoked a fifth amendment privilege. Defendant's counsel, on notice that McLane was asserting a privilege, persisted nonetheless with his questioning, taking, in his own words, "a calculated risk." The ultimate result of this gamble was that defendant was able to introduce otherwise inadmissible testimony, highly damaging to plaintiff, which, rather than "impeaching" of McLane's invocation of the fifth amendment, vindicated its propriety.

2. While it is true that McLane did answer a few questions, it is plain that none of these responses were in any way harmful to the insurance company, thus confirming that the only purposes for allowing Miller to testify was to impeach

what the trial court initially believed was a permissible negative inference to be drawn from McLane's invocation of the fifth amendment.

3. The majority's conclusion that portions of Miller's testimony were admissible, see typescript at 17, further reveals its implicit holding, for as discussed earlier, the sole purpose of Miller's entire testimony was to impeach McLane's invocation of the fifth amendment. Unless this impeachment is proper, all of Miller's testimony was erroneously admitted.

4. Baxter does not refer to non-party witnesses in civil actions, and the sole authority cited by the Court in authorizing inferences as to parties explicitly states that inferences are not to be taken from a witness's assertion of fifth amendment privilege. 8 Wigmore, Evidence §2272, at 437 (McNaughton rev. 1961). Commentators have ratified

Wigmore's distinction between the invocation of fifth amendment privilege by a witness as opposed to a party, see, e.g., Morrison, Commentary: Availability of Fifth Amendment Privilege Against Self-Incrimination and the Permissibility of Drawing Adverse Inferences: Alternative Perspectives, 48 A.B.A. Antitrust L.J. 1421 (1980); Moxham, A Comment Upon the Effect of Exercise of One's Fifth Amendment Privilege in Civil Litigation, 12 New Eng. L. Rev. 265 (1976); Note, Use of the Privilege Against Self-Incrimination in Civil Litigation, 52 Va. L. Rev. 322 (1966); Ratner, Consequences of Exercising the Privilege Against Self-Incrimination, 25 U.Chi. L. Rev. 472 (1957), and I am aware of no other appellate court that before today has extended Baxter's ruling to include witnesses. While several district court opinions indicate that references may be drawn from a witnesse's inv ocation of the fifth amendment, e.g. ,

Brink's, Inc. v. City of New York, 539 F. Supp. 1130, 1141-42 (S.D.N.Y. 1982); E.H. Boerth Co. v. LAD Properties, 82 F.R.D. 635, 644-45 (D. Minn. 1979); Poplar Grove Planting and Refining Co. v. Bache Halsey Stuart Inc., 465 F. Supp. 585, 591 (M.D. La. 1979), to the extent that these decisions simply extend to witnesses prevailing rules concerning civil parties, without further analysis, they are subject to the same criticism I offer with respect to the majority opinion today.

5. This reasoning, allowing a distinction to be drawn between criminal and civil cases, is far from compelling, and I would reject this schizophrenic approach. See Proposed Rule 513, Fed. R. Evid., 56 F.R.D. 183, 260 (1973) (no inference to be drawn from invocation of privilege) (rejected by Congress on unrelated grounds, see 2 Weinstein's Evidence §501[01][-02] (1981)). Even Baxter's sole authority suggests that the

cases establishing the allowance of an inference from a party in a civil matter are "confused." 8 Wigmore, Evidence §2272, at 437 & n.9 (McNaughton rev. 1961). If institutional concerns exist in the civil context incongruent with the assertion of the priviletge by parties, it would seem that other corrective measures exist which do not create analytic distorion. It makes as much sense to charge a party $5 for each invocation by him as to charge him with an adverse inference on each occasion. If the object is merely to make the invocation costly, or to recompense the adversary, then a toll is as intellectually gratifying as an unreasonable inference. On the other hand, it does make sense, for example, to prohibit direct testimony from a lparty unwilling to answer relevant questions on cross examination. That approach is not designed to be a penalty, but prevents thee fifth amendment from being used for unfair advantage.

That Baxter's holding is troublesome is further evidenced by the Court's distinguishing of Baxter from Garrity v. New Jersey , 384 U.S. 493 (1967), and the line of cases that follows. The latter cases bar the imposition of sanctions where the only basis for penalization is the invocation of fifth amendment prilvilege in the absence of other evidence. In their allowance of inferences to be drawn against civil parties, I read Baxter and Lefkowitz v. Cunningham, 431 U.S. 801, 808 n.5 (1977), to say that such inferences, while clearly costly, are acceptable until they become too costly. I remain unconvinced that the fifth amendment tolerates such flimsy construction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 79-2034 CIVIL ACTION

FILIPPO LIONTI and CARMELA LIONTI husband and wife, ROUTE 202 CORPORATION t/a LIONTI'S VILLA and/or THE ITALIAN VILLA

vs.

BERKLEY CHARLES BERKLEY-PORTMAN EXCESS INSURANCE COMPANY BELLEFONTE INSURANCE COMPANY, and DOMINION INSURANCE COMPANY, Edinburgh, Scotland

OPINION

DITTER, J. March 5, 1981

This is a suit to recover fire insurance proceeds. It comes before the court on plaintiffs' post-trial motions asking that the jury's verdict be set aside on the grounds that there was insufficient evidence to sustain it and that it was given under the influence of passion and prejudice. For the reasons which follow, plaintiffs' motion must be denied.

On September 20, 1978, a fire destroyed Lionti's Villa, an Italian

restaurant in Chadds Ford, Pennsylvania. The building had been built and the business operated by Mr. and Mrs. Filippo Lionti and their three children. The defendants did not deny that their insurance policies were in effect but contended that the Liontis were not entitled to payment because they had set the fire themselves or caused it to be done and that in the alternative, plaintiffs had committed fraud by making false statements concerning the extent of their losses. After proving the existence of the policies and introducing evidence as to their damages, the plaintiffs rested.

Defendants showed that the fire had started in the early morning hours with an explosion which in moments engulfed the building in flames. Later five containers of gasoline were found in different parts of the building. No accidental cause for the fire was suggested and it was clear that it had begun inside the restaurant.

The doors were barred and locked making entrance for the firefighters difficult. There was no sign of forced entrance and the burglar alarm had not been activated. Without question, the fire was of incendiary origin, apparently started by an electric lighter of the type used to ignite charcoal for home barbecues.

Defendants also showed that the Liontis were in precarious financial condition. They had opened the restaurant in December, 1976, but were plagued from its beginning by undercapitalization and insufficient receipts. As a result, certain construction and equipment costs went unpaid, vendors' bills were in arrears, and taxes were in default. Even the monthly payments for fire insurance were sporadic and cancellations of the policies constantly threatened. However, a few days before the fire, a payment was made and the policies were kept in force. The mortgage had been foreclosed and the

Liontis given a few days in which to list the property for sale. It was with matters in this state that the building was destroyed. When the insurance companies settled with the mortgagee but refused to make payment to the Liontis, the present suit was started.

Plaintiffs contended that the defendants did not pay their claim because they hoped through a settlement agreement to recoup from the mortgage company a portion of the money paid to it under the policies' mortgagee clause. Plaintiffs asserted that one of their former employees had a grudge against them and may have been responsible for the fire. In adddition, they maintained they had no reason to burn the building and that their financial troubles were largely the result of inadequate records and their inability to understand business practices and the requirements of the tax laws.

Although the defendants' case

relied exclusively on cirumstantial evidence, it was of more than sufficient volume and weight to justify the finding that the Liontis had set the fire or caused it to be set. In addition, there was nothing to indicate that the jury acted under the influence of any passion or prejudice and no argument was advanced to explain this contention. Simply stated, there was overwhelming evidence that a fire of incendiary origin destroyed a comparatively new business run by inexperienced persons in precarious financial condition. The jury's verdict was justified and no reason has been suggested to set it aside. See generally Mele v. All-Star Insurance Corp ., 453 F. Supp. 1338 (E.D.1978).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE

THIRD CIRCUIT

No. 81-1659

LIONTI, FILIPPO and LIONTI, CARMELA
husband and wife, and ROUTE 202
CORPORATION t/a LIONTI'S VILLA

vs.

LLOYD'S INSURANCE COMPANY, and
DOMINION INSURANCE COMPANY
BERKLEYL CHARLES BERKLEY-PORTMAN,
EXCESS INSURANCE COMPANY,
BELLEFONTE INSURANCE COMPANY, and
DOMINION INSURANCE COMPANY,
Edinburgh, Scotland

Filippo Lionti and Carmela Lionti
husband and wife, Route 202
Corporation t/a Lionti's Villa
and/or The Italian Villa,
Appellants

(D.C. Civ. No. 79-2034)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Present: HUNTER and GARTH, Circuit Judges
, and STERN District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District

Court for the Eastern District of Pennsylvania.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 6, 1981, be, and the same is hereby affirmed. Costs annexed against appellants.

ATTEST:

Chief Deputy Clerk

June 10, 1983

---

*Honorable Herbert J. Stern United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

NO. 81-1659

LIONTI, FILIPPO and LIONTI, CARMELA,
husband and wife, and ROUTE 202
CORPORATION, t/a LIONTI'S VILLA

vs.

LLOYD'S INSURANCE COMPANY, and
DOMINION INSURANCE COMPANY

BERKLEY CHARLES BERKLEY-PORTMAN,
EXCESS INSURANCE COMPANY,
BELLEFONTE INSURANCE COMPANY, and
DOMINION INSURANCE COMPANY,
Edinburgh, Scotland

Filippo Lionti and Carmela Lionti
husband and wife, Route 202
Corporation t/a Lionti's Villa
and/or The Italian Villa
Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge , ADAMS,
GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM,
SLOVITER and BECKER, Circuit Judges

The petition for hearing filed by Appellants, Filippo Lionti and Carmela Lionti, husband and wife, Route 202 Corporation t/a Lionti's Villa and/or The

Italian Villa in the above entitled case having been submitted to the judges who participated in the decision of thiss court, and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

Circuit Judge

DATED: July 7, 1983

No. 83-577

In The

Supreme Court of the United States

October Term, 1983

LIONTI, FILIPPO AND LIONTI, CARMELA, husband and wife, and ROUTE 202 CORPORATION trading as LIONTI'S VILLA,

Petitioners,

vs.

LLOYD'S INSURANCE COMPANY AND DOMINION INSURANCE COMPANY, BERKLEY CHARLES BERKLEY-PORTMAN EXCESS INSURANCE COMPANY, BELLEFONTE INSURANCE COMPANY, and DOMINION INSURANCE COMPANY, Edinburgh, Scotland,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

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No.

In The

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October Term, 1983

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Petitioners,

vs.

LLOYD'S INSURANCE COMPANY AND DOMINION INSURANCE COMPANY, BERKLEY CHARLES BERKLEY-PORTMAN EXCESS INSURANCE COMPANY, BELLEFONTE INSURANCE COMPANY, and DOMINION INSURANCE COMPANY, Edinburgh, Scotland,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

SUMMARY OF ARGUMENT

I. The question presented was never presented nor addressed in the lower court.

II. The question presented is premature due to the lack of the lower courts' opportunity to consider the issue.

III. The opinion below was correct and reached a fair result.

REASONS FOR DENYING THE WRIT

I.

The question presented was never presented nor addressed in the lower court.

The question now presented by petitioner was not decided by the court of appeals. The court's opinion dispels any doubt in this regard wherein it states that:

> ". . . it must be remembered that despite the evidentiary setting, . . . Lioniti in this appeal has never asserted any error based on McLane's claim of a Fifth Amendment privilege. Indeed, while Lioniti, advanced an argument on this point to the district court in a post-trial motion, it has evidently been abandoned on appeal. Our disposition of this appeal makes it unnecessary to address this issue." *Lionti v. Lloyd's Ins. Co.*, 709 F.2d 237, 242 n. 8 (3d Cir. 1983).

Consequently, this petition does not present a ripe constitutional question of such importance as to warrant the expenditure of this Honorable Court's limited resources. On the contrary, this case, in essence, involved the routine discretionary application of the "harmless error" rule. *Id.* at 243.

The petitioner's failure to present and preserve the issue for review provides another reason for precluding petitioner from

obtaining the desired review. As a result of petitioner's decision not to advance the present argument at the appellate level, the issue is not properly postured for Supreme Court review.

A review of petitioner's claim, in its present posture, would, in effect, amount to rendering an advisory opinion. This petition's avowed purpose is to call upon this Honorable Court to provide guidelines to trial attorneys and thus, hopefully, prevent possible impermissible trial tactics. Respondent respectfully submits that petitioner's request does not provide the proper basis for Supreme Court review (Petitioner's Brief at 8, 9, 14).

II.

The question presented is premature due to the lack of the lower court's opportunity to consider the issue.

Whether there is evidential value in a non-party witness' invocation of the Fifth Amendment privilege in a civil case is an issue no court of appeals, and only one district court has ever squarely addressed.

The lack of virtually any federal court review of the question presented militates against this Court's acceptance of this petition for review. Respondent respectfully suggests that this Honorable Court would be better served by deferring consideration of the issue until the Court has the benefit of the lower courts' analysis. Such an approach would provide this Court with the benefit of a developed body of law composed of a variety of views and factual scenarios.

The paucity of decisions in this area is an objective and revealing rebuttal to petitioner's contention that this question is of such constitutional significance as to merit this Court's prompt consideration.

Rule 17 of the Rules of this Honorable Court provides guidance concerning the granting of a petition for certiorari. Rule 17 suggests that a conflict among the court of appeals is indicative of "the character of reasons that will be considered". This petition presents a completely opposite situation. However, simply because this question has never been addressed is not sufficient reason for granting a writ of certiorari. If it were, this Court would be further inundated with petitions, since the same could be said for countless issues.

III.

The opinion below was correct and reached a fair result.

The district court found that evidence of Lionti's complicity in the fire was, although largely circumstantial, overwhelming. The district court stated that:

> "Although the defendant's case relied exclusively on circumstantial evidence, it was of more than sufficient volume and weight to justify the finding that the Liontis had set the fire or caused it to be set . . . . Simply stated, there was overwhelming evidence that a fire of incendiary origin destroyed a comparatively new business run by inexperienced persons in precarious financial condition."[1] (Appendix, 26a).

---

1. Petitioners showed that the fire had started in the early morning hours with an explosion which in moments engulfed the building in flames. Later five containers of gasoline were found in different parts of the building. No accidental cause for the fire was suggested and it was clear that it had begun inside the restaurant. The doors were barred and locked making entrance for the firefighters difficult. There was no sign of forced entrance and the burglar

(Cont'd)

The appellate court agreed with the district court's assessment of the evidence. Although the appellate court noted the district court's erroneous admission of certain statements, it nonetheless concluded that:

> "In light, however, of the overwhelming evidence adduced during trial, we are satisfied that [the] statement, while erroneously admitted, was harmless." 709 F.2d at 243.

Granting petitioner's writ would unnecessarily disturb a lengthy trial which culminated in a correct and fair result.

(Cont'd)

alarm had not been activated. Without question, the fire was of incendiary origin, apparently started by an electric lighter of the type used to ignite charcoal for home barbecues.

Petitioners also showed that the Liontis were in precarious financial condition. They had opened the restaurant in December 1976, but were plagued from its beginning by undercapitalization and insufficient receipts. As a result, certain construction and equipment costs were in default. Even the monthly payments for fire insurance were sporadic and cancellations of the policies constantly threatened. However, a few days before the fire, a payment was made and the policies kept in force.

CONCLUSION

For the reasons stated above, the respondents respectfully submit that the decision of the Third Circuit Court of Appeals was correct and, further, does not present a constitutional question ripe for Supreme Court review. Wherefore, respondents respectfully request that this Honorable Court deny the pending petition for certiorari.

Respectfully submitted,

MICHAEL F. HENRY
DAVID R. STRAWBRIDGE
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Attorneys for Respondents

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(FILED JUNE 10, 1983)

No. 81-1659

LIONTI, FILIPPO and LIONTI, CARMELA, husband and wife, and ROUTE 202 CORPORATION trading as LIONTI'S VILLA

v.

LLOYD'S INSURANCE COMPANY, and DOMINION INSURANCE COMPANY

BERKLEY CHARLES BERKLEY-PORTMAN, EXCESS INSURANCE COMPANY, BELLEFONTE INSURANCE COMPANY, and DOMINION INSURANCE COMPANY, Edinburgh, Scotland

Filippo Lionti and Carmela Lionti, husband and wife, Route 202 Corporation t/a Lionti's Villa and/or The Italian Villa,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Civil Action No. 79-2034)

Argued December 16, 1982

Opinion of the United States Court of Appeals

Before: HUNTER and GARTH, Circuit Judges and STERN, District Judge*

(Opinion Filed June 10, 1983)

GARTH, Circuit Judge.

This appeal presents for our review two claimed evidentiary errors which occurred during a thirteen-day trial. The plaintiffs Filippo and Carmela Lionti ("Lionti") contend that these two alleged errors should result in the grant of a new trial. We cannot agree.

On September 20, 1978, The Italian Villa, a restaurant and bar owned by Lionti, burned to the ground. Lionti brought this action against the insurer[1] after the insurer disallowed his claim for policy proceeds. The insurer refused Lionti's claim on the ground that Lionti set or procured the setting of the fire. The jury returned a verdict in favor of the insurance company. Lionti appeals from an order of the district court denying his motion for a new trial.[2] Because we find no error affecting a substantial right of the parties, we affirm.

The Italian Villa was a single story stone structure with a full basement containing a restaurant and bar. At roughly 5:00 a.m. on September 20, 1978, a violent explosion erupted in the building, shattering windows in a house nearby and catapulting debris over 100 feet away.

On November 16, Lionti submitted proofs of loss to his insurance company. These proofs of loss asserted losses of $266,606 for the building itself, $114,256 for its contents, $83,850 for interruptions of business income, and affirmed that the origin

of the fire was "unknown to assured." Lionti initiated this action on June 6, 1979, claiming that the insurer had not reimbursed Lionti for the losses sustained, although the insurer had paid Lionti's mortgagee, the First Mortgage Company of Pennsylvania, $180,000 under the policy's loss-payable clause. On September 21, the insurer counterclaimed against Lionti for $180,000, the loss paid to First Mortgage, as subrogees of First Mortgage's rights. The case proceeded to trial on February 13, 1980.

A.

Evidence adduced at trial was overwhelming that the September 20 fire had been set intentionally. Firemen entering the structure found gasoline vapors in the basement so strong that they were unable to remain in the building. Burn patterns on the floor of the restaurant indicated that the fire had been spread by a flammable liquid. Inside the restaurant's kitchen door lay an extension cord plugged into a wall outlet and terminating in an electric charcoal lighter; lying beneath the charcoal lighter were two plastic containers smelling of gasoline. Firefighters removed from the building these two containers and three others; laboratory tests proved at least four of these five containers to contain gasoline. Carpeting and debris throughout the restaurant were also impregnated with gasoline. In the opinion of several experts, the magnitude of the explosion, the residue of gasoline and location of gasoline containers, and the presence of an electric starter coil left little doubt that the fire was of incendiary origin.

Evidence that Lionti was responsible for the fire was also compelling, although largely circumstantial. The evidence of Lionti's complicity fell into three categories.

First, testimony indicated that the Italian Villa was financially troubled during the months before the fire. Sales during the months

of August, 1978, were $16,324, substantially less than the August 1977 sales of $25,586. Sales during the nine months preceding the fire were only $133,000, again considerably less than the prior nine months' sales of $217,000. Based on Lionti's corporate 1978 tax return, an expert estimated Lionti's yearly expenses at $84,000; Lionti had available cash, however, of only $58,000, resulting in a cash flow shortage of $26,000. Nine checks issued by Gina Lionti, daughter of Filippo and Carmela, in August and September of 1978 were returned for insufficient funds. By August of 1978, the Italian Villa had fallen behind in payments to at least seven creditors, including three banks or savings and loans associations. Real estate, sales, and payroll taxes for the 1977 tax year were all delinquent.

Second, nine days before the fire, the First Mortgage Company of Pennsylvania notified Lionti that First Mortgage intended to call in a loan of $392,000 and foreclose on its security interests, including the restaurant and Lionti's liquor license. Five days before the fire, Lionti entered into an oral agreement with First Mortgage stipulating that the restaurant would be put up for sale by September 25, and would be sold within ninety days thereafter. On Tuesday, September 19, Lionti was to sign documents memorializing this agreement. No agreement was ever signed. On Wednesday, September 20, the Italian Villa burned to the ground.

Third, several arrangements concerning Lionti's insurance raise strong inferences of Lionti's involvement in the September 20 fire. On September 12—one day after First Mortgage notified Lionti of its intention to foreclose—Gaetano Lionti, son of Filippo and Carmela, approached an insurance agent and sought to purchase an additional $500,000 of fire insurance for the restaurant. After the fire, the agent reported this solicitation to

the Pennsylvania fire marshal on his own accord. Asked why he approached the fire marshal, the agent explained, "Well, it's rather unusual when somebody requests a large amount of fire insurance in addition to what they may already have and then a couple of days later there is a fire." In addition, on September 14, Gina Lionti appeared in the office of Lionti's insurance agent and—for the first time in a two-year history of delinquent payments—prepaid three months' insurance premiums in advance of the date payment was due.

In the opinion of the insurer's expert, these facts, coupled with the absence of any indication of forcible entry, evidence that only Lionti had keys to the building and the alarm system, the early morning hour of the fire, and the absence of indicators that the fire had been set for revenge, fell "into a classic pattern of insurance fraud fire."

For his part, Lionti maintained that the fire harmed rather than assisted him financially, suggesting an absence of motive,[3] and implied that the insurer colluded with First Mortgage to recover from Lionti, moneys that the insurer owed First Mortgage as a loss mortgage payee named in the policies.[4] In addition, Lionti suggested that a disgrunted employee, Brice McLane, may have ignited the fire in revenge for his discharge from employment. The issues presented by this appeal arise principally as a consequence of McLane's testimony.

B.

McLane had been hired by Lionti in July or August of 1978 to promote business. After several disputes with McLane over a bartender, McLane was paid $300 for his services and was discharged. The district court permitted Gina Lionti to testify to

several declarations of McLane suggesting motive of revenge. According to Gina, McLane stated, "No, she [the bartender] don't go. She's got to stay here. . . . Things are going my way, otherwise I will blow up the whole place with dynamite."

In order to rebut the inference that McLane, and not Lionti, started the fire the insurer called McLane to testify. Asked whether McLane recalled a argument or discussion with Gina Lionti during the summer of 1978, McLane asserted the fifth amendment privilege against self-incrimination. Nevertheless, taking what counsel for the insurer, David Strawbridge, characterized during oral argument as "a calculated risk," Strawbridge pressed on with additional questions. McLane denied threatening to harm Lionti or to burn, dynamite, or destroy the restaurant. However, in answer to the following question—"Did you have anything to do with setting the fire, Mr. McLane?"—McLane responded, "I refuse to answer that question on the grounds it may tend to incriminate me."

Strawbridge immediately approached the bench and informed the court that only an hour or so earlier, McLane had told Strawbridge and the insurer's investigator, William Miller, that McLane "did not have anything to do with the setting of the fire." Strawbridge consequently sought a ruling that McLane be compelled to answer. Accordingly, the district court excused the jury and conducted a hearing on the admissibility of McLane's testimony.

McLane proceeded to confirm that he told Strawbridge and the investigator, Miller, that McLane was not involved in the fire. The court thereupon ruled that the insurer would be permitted to plead surprise and impeach the inference drawn from McLane's assertion of the fifth amendment privilege. In particular, the court

ruled that McLane could be asked whether, within the previous hour, McLane told Strawbridge and Miller that he, McLane, had nothing to do with the fire. If McLane answered this question in the affirmative, the court ruled, McLane could then be asked whether this prior statement was true. Finally, the court ruled that McLane had not waived the fifth amendment privilege by virtue of any statements made to Strawbridge and Miller.

Still out of the presence of the jury, Strawbridge asked the questions authorized by the court. McLane confirmed that he told Strawbridge and Miller several hours earlier that he, McLane "had nothing to do with the fire." Strawbridge thereafter proposed to question McLane along these lines in the presence of the jury. The court agreed, but directed counsel "not to ask [McLane] questions where he has said he will invoke his privilege."

Before the jury, McLane again denied threatening Lionti. Strawbridge then asked whether McLane recalled "me asking you if you were in any way connected with the fire, involved with the fire." McLane responded, "I refuse to answer on the grounds it would intend to incriminate me." Strawbridge did not ask the court to compel an answer to this question.

Thus thwarted in his desire to impeach McLane by eliciting from McLane a prior statement inconsistent with McLane's reasserted privilege against self incrimination, Strawbridge called the investigator, Miller, to the stand. Counsel for Lionti objected to Miller's testimony in total.[4] During a hearing on the admissibility of Miller's testimony, Miller related that McLane told Miller that McLane had been approached by Gaetano Lionti with questions concerning how one would set a fire. According to Miller, McLane reported that he had sketched on a napkin the plan for a fire that "could cause the total destruction of the building." Miller also proposed to recite the contents of McLane's remarks made

in the corridor to the effect that McLane had nothing to do with the fire, and proposed to testify that McLane sought to obtain money in exchange for favorable testimony first from the insurer, and then from Lionti.

At the conclusion of Miller's voir dire, the court permitted Miller to testify only for the purpose of "impeach[ing] statements made by Mr. McLane that would be inconsistent with statements he made to Mr. Miller." Before the jury, Miller testified to McLane's remarks in the corridor to the effect that McLane was not involved in the commission of the fire. Strawbridge offered Miller's account of McLane's remarks not for the truth of the matter asserted, but for the fact that McLane made them and that they were inconsistent with McLane's subsequent assertion of the fifth amendment privilege.

Miller also testified to two other out-of-court declarations of McLane. Asked what McLane told Miller "with respect to his interest in compensation [from the insurers] as concerned his testimony," Miller replied:

> "He indicated to me that he had information concerning the cause and origin of the fire and he had information concerning questions that had been brought to him by members of the Lionti family concerning the fire, concerning how someone would set a fire."

The court sustained Lionti's objection to this answer, granted Lionti's motion to strike, and instructed the jury "to disregard it."

Asked about McLane's offer to Lionti to give favorable testimony in exchange for money, Miller began to relate that

McLane stated he had information that would "wrap the case up for the insurance company." Before Miller could utter the words, "wrap the case up for the insurance company," the court admonished Miller to stop speaking. Nevertheless, the court later permitted Miller to testify, over Lionti's objection, to McLane's assertion that McLane's information would "wrap the case up for the insurance company and the Liontis were not dumb and they would be willing to make a deal." The court did not, however, permit Miller to relate the substance of the information that, in McLane's words, would "wrap the case up for the insurance company."

At the conclusion of Miller's testimony, the court instructed the jury that Miller's testimony could be used only to impeach McLane's credibility, an instruction reiterated during the court's charge to the jury.[3] The district court also charged that McLane's assertion of the privilege against self-incrimination "is to have no evidentiary value at all." See note 9 infra.

The jury returned a verdict in favor of the insurance company. The court denied Lionti's subsequent motion for a new trial or for a judgment notwithstanding the verdict, noting that "[a]lthough the defendants' case relied exclusively on circumstantial evidence, it was of more than sufficient volume and weight to justify the finding that the Liontis had set the fire or caused it to be set."

Lionti's brief on appeal raises only two issues. Both concern Miller's testimony. Neither concerns McLane's assertion of his fifth amendment privilege.[4] First, Lionti seeks a new trial based on Miller's account of McLane's statement that questions "had been brought to [McLane] by members of the Lionti family concerning . . . how someone would set a fire." The district court

granted Lionti's belated objection and motion to strike. Nevertheless, Lionti argues that the court's instruction to disregard this statement did not purge the trial of prejudice.

Second, Lionti maintains that Miller's recitation that McLane had evidence that would "wrap the case up for the insurance company," and for which Lionti "would be willing to make a deal," requires a new trial. The clear inference, Lionti asserts, "is that the Liontis would pay McLane to keep quiet because the Liontis had started the fire" (Appellants' Brief, at 13-14). Lionti argues that by so testifying, Miller violated the district court's admonition not to disclose the contents of the information McLane possessed that would "wrap the case up for the insurance company." In addition, Lionti claims that McLane's outburst in this respect requires a new trial.

III.

We need dwell only briefly on Miller's account of McLane's offers to "sell" favorable testimony. As Lionti properly observes, the first of Miller's contested statements—relating McLane's out-of-court declaration that Lionti approached McLane with questions "concerning how someone would set a fire"—was hearsay. Because the district court granted Lionti's motion to strike and instructed the jury to disregard this statement, we must ask whether Miller's statement was so prejudicial as to require a new trial.

"The general rule is that if evidence which may have been taken in the course of a trial, be withdrawn from the consideration of the jury by the direction of the presiding judge, that such direction cures any error which may have been committed by its introduction." *Throckmorton v. Holt*, 180 U.S. 552, 567 (1901).

In addition, we are instructed by Fed. R. Civ. P. 61, and by 28 U.S.C. §2111 (1976), that no error or defect shall be ground for granting a new trial "unless refusal to take such action appears to the court inconsistent with substantial justice." See *Mercer v. Theriot*, 377 U.S. 152, 154 (1964) (per curiam); *Warrick v. Brode*, 428 F.2d 699 (3d Cir. 1970) (per curiam).

The district court found that evidence of Lionti's complicity in the fire was, although largely circumstantial, "overwhelming," App. at 162, and we cannot disagree. Evidence that Lionti sought to purchase an additional $500,000 of fire insurance nine days before the fire and one day after First Mortgage communicated its intention to foreclose, and that Gina Lionti, for the first time in two years (and six days before the fire), tendered an insurance premium before it was due, was more than ample to link Lionti to the fire. We are satisfied that this single unresponsive outburst by Miller, in the context of a thirteen-day trial, followed immediately by the court's curative instruction, did not affect the jury's verdict.

Miller's second statement—recounting McLane's suggestion that McLane had information that would "wrap the case up for the insurance company"—is charged by Lionti to violate the district court's earlier ruling not to disclose the substance of McLane's remarks, and to be so prejudicial that reversal of the jury verdict is required. First, our reading of the record discloses that the district court's admonition was not breached. Miller did not reveal the substance of McLane's information that would "wrap the case up for the insurance company."

Second, in order to appreciate the context in which this statement was made, it must be remembered that the insurance company had called McLane as a witness to testify that he,

McLane, had stated to Miller that McLane "did not have anything to do with the setting of the fire." McLane, however, had remained silent, and the district court did not compel him to testify. In its final instruction to the jury, the court instructed that McLane's "exercise of his constitutional privilege [had] no evidentiary value at all."[9]

Thus, to the extent that the district court removed from the jury's consideration McLane's claim of privilege, Miller's testimony as to what McLane had told him—that McLane "did not have anything to do with the setting of the fire"—was hearsay.

In light, however, of the overwhelming evidence adduced during trial, we are satisfied that Miller's statement, while erroneously admitted, was harmless. See Fed. R. Evid. 103(a).[10] While the court admitted Miller's testimony erroneously in this one respect, it was not error to admit Miller's testimony which related to McLane's eagerness to "sell" information first to the insurance company, and then to Lionti. McLane's willingness to sell his information was available for legitimate consideration by the jury in assessing his credibility.

Thus, we find no error in the admission of this segment of Miller's testimony. Furthermore, we are satisfied that even were it otherwise, Miller's later testimony, even in combination with his earlier one-sentence out burst, would constitute harmless error under the standard previously addressed, and would therefore be insufficient to warrant a new trial.

IV.

The March 6, 1981 order of the district court will be affirmed.

FOOTNOTES

1. The defendants Charles Berkley-Portman, representing a number of individual insurers known colloquially as Lloyd's of London, and the Dominion Insurance Co., issued policies of insurance covering the property which the parties stipulate were "in full force and effect subject to all [their] terms and conditions at the time of the loss. The defendants are identified hereinafter as the "insurer" or "insurance company."

2. Although the order of the district court from which Lionti appeals denies Lionti's motion both for a new trial and for judgment notwithstanding the verdict, the record does not disclose a motion for directed verdict at the close of the evidence. The denial of Lionti's motion for judgment notwithstanding the verdict is therefore not before us. Fed. R. Civ. P. 50(b); see *Lowenstein v. Pepsi-Cola Bottling Co.*, 536 F.2d 9, 10-12 (3d Cir.), cert. denied, 429 U.S. 966 (1976).

3. Lionti's loan agreement with First Mortgage included a prepayment penalty clause. According to Edward Sicles, president of First Mortgage, the settlement between First Mortgage and the insurer constituted a "prepayment" exposing Lionti to a prepayment penalty. In addition, Lionti's proofs of loss for those claims respecting the contents of the building and business interruption exceeded the policy limits of $50,000.00.

4. On April 12, 1979, the insurer and First Mortgage executed a "release and agreement of assignment," according to which the insurer agreed to pay First Mortgage $180,000 under the policy's loss-payable clause. This payment formed the basis for the insurer's counterclaim against Lionti. First Mortgage, in turn, released the insurer from all claims due under the policy. The

agreement recited that First Mortgage "intends to exercise its rights of foreclosure"; the agreement also included a formula permitting the insurer to share in moneys obtained by First Mortgage as the result of a foreclosure. Because First Mortgage held security interests in properties other than the restaurant, and because Lionti owed First Mortgage considerably more than $180,000, First Mortgage anticipated foreclosing on additional property. The insurer, in turn, anticipated sharing in this income, and thereby recouping some, if not all, of the $180,000 paid over to First Mortgage. Lionti hoped the jury would draw an inference that as a result of a sweetheart deal between the insurer and First Mortgage, the insurer had nothing to lose, and much to gain, by disclaiming liability.

5. McLane testified that he had retained counsel in Delaware who "was not available to come with me today on such short notice," and who had advised McLane to "take the Fifth Amendment on any questions concerning my involvement in the fire." McLane informed the court that he had been arrested for charges growing out of the fire and was under investigation by the Treasury Department for possible involvement in the fire.

6. Counsel objected as follows:

MR. SEIGLE: Your Honor, do I object on the record at this point? Because, you know, I object to the whole line of testimony of this witness with respect to his testimony as against the witness yesterday, Brice McLane.

7. The district court charged as follows:

[Y]ou are not to use anything that William Miller said about his prior conversation with Brice McLane to establish what Brice

McLane actually said, or to establish any fact for one side or the other. The only purpose for Mr. Miller's testimony was that of discrediting Brice McLane as a witness, if in fact you think that it did discredit him.

8. Although in text we have set forth, in some detail, the evidentiary development giving rise to the two claims of error now asserted by Lionti, we have done so only to place Miller's testimony, challenged by Lionti, in its proper context. Thus, it must be remembered that despite the evidentiary setting which resulted in Miller's testimony, Lionti in this appeal has never asserted any error based on McLane's claim of a fifth amendment privilege. Indeed, while Lionti advanced an argument on this point to the district court in a post-trial motion, it has evidently been abandoned on appeal. Our disposition of this appeal makes it unnecessary to address this issue. See note 10 infra.

9. The district court charged as follows:

There is one more thing you should bear in mind with regard to this particular witness Brice McLane. He exercised his privilege against self-incrimination. That was his right and you are not to infer anything adverse to either the plaintiffs or anything adverse to the defendants by reason of what Brice McLane did. There may very well be a myriad of reasons why he would choose to exercise his privilege against self-incrimination, and it would be improper for you to make any assumption or to try to guess or to surmise or puzzle out why he chose to exercise that privilege. Accordingly, you are directed that Brice McLane's exercise of his constitutional privilege is to have no evidentiary value at all.

10. Thus, contrary to the dissent's argument, we do not address the issue whether McLane's exercise of a fifth amendment privilege has evidential value.

DISSENTING OPINION

STERN, District Judge, dissenting.

Whether there is evidential value in a non-party witness's invocation of fifth amendment privilege in a civil case is an issue no court of appeals has ever squarely addressed. Today the majority makes a muscular attempt to avoid being the first to speak. Despite its insistence on non-decision, however, the majority implicitly answers the question affirmatively. I am therefore unable to join its decision.

The trial court ruled that McLane's assertion of fifth amendment privilege was proper, and then permitted the insurance company to call Miller, its own agent, as a collateral witness for the sole purpose of "impeaching" McLane's invocation of privilege.[1] Counsel for the insurance company readily admitted at oral argument that Miller was called in order to impeach McLane's refusal to testify, and the majority notes that Miller's testimony was offered "not for the truth of the matter asserted, but for the fact that McLane made [the statements] and that they were inconsistent with McLane's subsequent assertion of the fifth amendment privilege."[2] Typescript at 11.

A few days later, the trial court reversed itself in its charge to the jury, and instructed that the assertion of the fifth amendment has no evidential worth. See Typescript at 16 n.9. In spite of the fact that the trial court thus made rulings flatly inconsistent with each other as to the evidential content of the invocation of the fifth amendment, the majority insists that it is not necessary to resolve this confusion. Instead, the majority professes to limit its holding by stating that it is not ruling on the fifth amendment evidential question, but only on the error

produced by allowing portions of Miller's testimony on a basis inconsistent with subsequent jury instructions.

There can be no dispute that the trial court either committed error in originally permitting the inference and its rebuttal, or that it committed error in ruling in its final instruction that no inference can be drawn. It can not be right as to each. The majority's refusal to say which is correct authorizes both, and hereafter leaves to the trial court's discretion the decision whether or not to allow an inference to be taken from a non-party witness's invocation of fifth amendment privilege.[1] In my view, this is grave error for two reasons: it transposes the determination as to the propriety of invoking privilege from judge to jury, and it imparts evidential value to the assertion of the fifth amendment.

In general, the invocation of the fifth amendment privilege is without evidential content. Certainly in the criminal setting this is so, where it is understood that

> "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullmann v. United States*, 350 U.S. 422, 426-29 (1956)], a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

Slochower v. Board of Higher Education, 350 U.S. 551, 557-58 (1956) (citing Griswold, The Fifth Amendment Today (1955)). *Accord Grunewald v. United States*, 353 U.S. 391, 421 (1957).

This follows from the fact that in order to invoke the privilege it is only necessary that from the question alone it is not possible to say that an answer would not incriminate or even furnish a "link in the chain of evidence needed to prosecute the claimant for a federal crime." *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (citing *Blau v. United States*, 340 U.S. 159 (1950)). *Accord United States v. Lowell*, 649 F.2d 950, 963-64 (3d Cir. 1981) (citing *United States v. Burr*, 25 F. Cas. 38 (C.C.D. Va. 1807) (No. 14,692e) (Marshall, C.J.), where "link in the chain" test first announced); *United States v. Coeffey*, 198 F.2d 438, 440 (3d Cir. 1952). Since the judge must determine the propriety of the invocation from the question alone, it is impossible to make meaningful inferences from the invocation of this privilege. The judge must act blindly; he may not speculate or infer what the actual answer is. His ruling permitting the refusal to testify cannot authorize a jury to infer what the answer might have been. In the setting of a courtroom, a witness may have many reasons for refusing to give testimony. Under the fifth amendment test, once a witness invokes privilege it is nigh to impossible to determine why he has done so, or to overrule his refusal. Just as courts can never be comfortable that in upholding the invocation they truly vindicate the privilege, juries are left with nothing but rank speculation in attempting to draw inferences from such an event.

In only one limited context have courts accorded the refusal to testify with evidential import: the invocation of the fifth amendment by parties in civil litigation. See *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).[4]

The reasoning behind this exception, although less than satisfying, would appear to be that this is a necessary toll exacted from civil litigants who might otherwise use the privilege as a weapon against the opposing side. Allowing inferences to be drawn

from a party's invocation of the fifth amendment is, in this view, a transaction cost of litigation whose potential harshness is mitigated by the ability of a party, through counsel, to explain the control the contours of his invocation. See, e.g., Heidt, The Conjurer's Circle: The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062 (1982); Note, Plaintiff as Deponent: Invoking the Fifth Amendment, 48 U. Chi. L. Rev. 158 (1981); Daskal, Assertion of the Constitutional Privilege Against Self-Incrimination in Federal Civil Litigation: Rights and Remedies, 64 Marq. L. Rev. 243 (1980); Kaminsky, Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis, 39 Brooklyn L. Rev. 121 (1972); Ratner, supra at 5 n.4.[3]

To the extent that these concerns exist where parties are involved, none are implicated when a mere witness, with no stake in the matter, invokes privilege. Provided that such behavior is not the responsibility of either party, it does not work any unfairness which requires penalization. To the contrary, it is by allowing inferences from witness's refusal to testify that one party will be harmed, and in a manner that is beyond his power to control. While a party may be able to deflect the damage of adverse inferences taken from his own invocation through, for example, rehabilitating examination by his counsel, he is unable to defend against an adverse inference drawn against a witness which in turn harms his own case.

If we extend Baxter to include civil witnesses, we thereby approve of trial tactics I had until today thought impermissible. If the invocation of the fifth amendment is an evidential event, nothing prevents a civil party, or for that manner a criminal defendant, from calling a witness to the stand, with the sole and express purpose of having the jury hear the witness invoke a fifth amendment privilege and draw an inference. This practice has

been condemned, however, with respect to calling of witnesses by criminal defendants, see, e.g., *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir.) (quoting *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973)), cert. denied, 419 U.S. 1053 (1974); *Bowles v. United States*, 439 F.2d 536, 542 (D.C. Cir. 1970) (en banc), cert. denied, 401 U.S. 995 (1971), and I see no distinction as applied to civil parties. See also American Bar Association Project on Standards for Criminal Justice, Standard 4-7.6(c) (a lawyer should not call a witness who he knows will claim a valid privilege not to testify). Moreover, in certain instances such as that before us, the majority's implicit holding would permit the jury, rather than the judge, to determine the propriety of the invocation itself. In this case, for example, the trial court initially — and erroneously — considered that the jury could legally draw an inference that McLane had set the fire from McLane's invocation of privilege. Then, in permitting the defense to negate this inference with Miller's testimony, the court allowed the jury to retry the issue of the propriety of the invocation itself. It thus shifted the final responsibility for determining the propriety of the invocation from court to jury. There can be no doubt that this displacement of functions is impermissible. What the court should have done when McLane refused to answer was immediately to give the instruction it reserved for the end: that the jury should disregard McLane's invocation because it possessed no evidential worth.

The trial court's decision to admit Miller's testimony, inconsistent with its own belated instruction as well as articulate fifth amendment analysis, was error. Had the majority admitted the source of this error, but held that error harmless, there would be no occasion for disagreement. But an appellate holding that invites future juries to weigh the evidential worth of fifth amendment invocations, and that authorizes future advocates to call witnesses for the value in their refusals to testify, compels this dissent.

Opinion of the United States Court of Appeals

FOOTNOTES

1. The court ruled that impeachment of McLane was proper in order to "negative[] the unfavorable inference [McLane] may have created by his refusal to testify," App. at 54, and stated that "the only purpose of (Miller's) testimony is to impeach any inference that might have been drawn from Mr. McLane's testimony." App. at 86-87. It should also be emphasized that the circumstances leading to the invocation from which the allowed inference was drawn were entirely of defendant's creation. Very early in his direct examination, in response to a question concerning only a conversation between Gina Lionti and him, McLane invoked a fifth amendment privilege. Defendant's counsel, on notice that McLane was asserting a privilege, persisted nonetheless with his questioning, taking, in his own words, "a calculated risk." The ultimate result of this gamble was that defendant was able to introduce otherwise inadmissible testimony, highly damaging to plaintiff, which, rather than "impeaching" of McLane's invocation of the fifth amendment, vindicated its propriety.

2. While it is true that McLane did answer a few questions, it is plain that none of these responses were in any way harmful to the insurance company, thus confirming that the only purposes for allowing Miller to testify was to impeach what the trial court initially believed was a permissible negative inference to be drawn from McLane's invocation of the fifth amendment.

3. The majority's conclusion that portions of Miller's testimony were admissible, see typescript at 17, further reveals its implicit holding, for as discussed earlier, the sole purpose of Miller's entire testimony was to impeach McLane's invocation of the fifth amendment. Unless this impeachment is proper, all of Miller's testimony was erroneously admitted.

4. Baxter does not refer to non-party witnesses in civil actions, and the sole authority cited by the Court in authorizing inferences as to parties explicitly states that inferences are not to be taken from a witness's assertion of fifth amendment privilege. 8 Wigmore, Evidence §2272, at 437 (McNaughton rev. 1961). Commentators have ratified Wigmore's distinction between the invocation of fifth amendment privilege by a witness as opposed to a party, see, e.g., Morrison, Commentary: Availability of Fifth Amendment Privilege Against Self-Incrimination and the Permissibility of Drawing Adverse Inferences: Alternative Perspectives, 48 A.B.A. Antitrust L.J. 1421 (1980); Moxham, A Comment Upon the Effect of Exercise of One's Fifth Amendment Privilege in Civil Litigation, 12 New Eng. L. Rev. 265 (1976); Note, Use of the Privilege Against Self-Incrimination in Civil Litigation, 52 Va. L. Rev. 322 (1966); Ratner, Consequences of Exercising the Privilege Against Self-Incrimination, 25 U.Chi. L. Rev. 472 (1957), and I am aware of no other appellate court that before today has extended Baxter's ruling to include witnesses. While several district court opinions indicate that references may be drawn from a witness' invocation of the fifth amendment, e.g., Brink's, Inc. v. City of New York, 539 F. Supp. 1130, 1141-42 (S.D.N.Y. 1982); E.H. Boerth Co. v. LAD Properties, 82 F.R.D. 635, 644-45 (D. Minn. 1979); Poplar Grove Planting and Refining Co. v. Bache Halsey Stuart Inc., 465 F. Supp. 585, 591 (M.D. La. 1979), to the extent that these decisions simply extend to witnesses prevailing rules concerning civil parties, without further analysis, they are subject to the same criticism I offer with respect to the majority opinion today.

5. This reasoning, allowing a distinction to be drawn between criminal and civil cases, is far from compelling, and I would reject this schizophrenic approach. See Proposed Rule 513, Fed. R. Evid., 56 F.R.D. 183, 260 (1973) (no inference to be drawn from invocation of privilege) (rejected by Congress on unrelated

grounds, see 2 Weinstein's Evidence §501[01][-02] (1981)). Even Baxter's sole authority suggests that the cases establishing the allowance of an inference from a party in a civil matter are "confused." 8 Wigmore, Evidence §2272, at 437 & n.9 (McNaughton rev. 1961). If institutional concerns exist in the civil context incongruent with the assertion of the privilege by parties, it would seem that other corrective measures exist which do not create analytic distortion. It makes as much sense to charge a party $5 for each invocation by him as to charge him with an adverse inference on each occasion. If the object is merely to make the invocation costly, or to recompense the adversary, then a toll is as intellectually gratifying as an unreasonable inference. On the other hand, it does make sense, for example, to prohibit direct testimony from a party unwilling to answer relevant questions on cross examination. That approach is not designed to be a penalty, but prevents the fifth amendment from being used for unfair advantage.

That Baxter's holding is troublesome is further evidenced by the Court's distinguishing of Baxter from *Garrity v. New Jersey*, 384 U.S. 493 (1967), and the line of cases that follows. The latter cases bar the imposition of sanctions where the only basis for penalization is the invocation of fifth amendment privilege in the absence of other evidence. In their allowance of inferences to be drawn against civil parties, I read Baxter and Lefkowitz v. Cunningham, 431 U.S. 801, 808 n.5 (1977), to say that such inferences, while clearly costly, are acceptable until they become too costly. I remain unconvinced that the fifth amendment tolerates such flimsy construction.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 79-2034 CIVIL ACTION

FILIPPO LIONTI and CARMELA LIONTI husband and wife, ROUTE 202 CORPORATION t/a LIONTI'S VILLA and/or THE ITALIAN VILLA

vs.

BERKLEY CHARLES BERKLEY-PORTMAN EXCESS INSURANCE COMPANY BELLEFONTE INSURANCE COMPANY, and DOMINION INSURANCE COMPANY, Edinburgh, Scotland

OPINION

DITTER, J. March 5, 1981

This is a suit to recover fire insurance proceeds. It comes before the court on plaintiffs' post-trial motions asking that the jury's verdict be set aside on the grounds that there was insufficient evidence to sustain it and that it was given under the influence of passion and prejudice. For the reasons which follow, plaintiffs' motion must be denied.

On September 20, 1978, a fire destroyed Lionti's Villa, an Italian restaurant in Chadds Ford, Pennsylvania. The building had been built and the business operated by Mr. and Mrs. Filippo Lionti and their three children. The defendants did not deny that their insurance policies were in effect but contended that the Liontis were not entitled to payment because they had set the fire

themselves or caused it to be done and that in the alternative, plaintiffs had committed fraud by making false statements concerning the extent of their losses. After proving the existence of the policies and introducing evidence as to their damages, the plaintiffs rested.

Defendants showed that the fire had started in the early morning hours with an explosion which in moments engulfed the building in flames. Later five containers of gasoline were found in different parts of the building. No accidental cause for the fire was suggested and it was clear that it had begun inside the restaurant. The doors were barred and locked making entrance for the firefighters difficult. There was no sign of forced entrance and the burglar alarm had not been activated. Without question, the fire was of incendiary origin, apparently started by an electric lighter of the type used to ignite charcoal for home barbecues.

Defendants also showed that the Liontis were in precarious financial condition. They had opened the restaurant in December, 1976, but were plagued from its beginning by undercapitalization and insufficient receipts. As a result, certain construction and equipment costs went unpaid, vendors' bills were in arrears, and taxes were in default. Even the monthly payments for fire insurance were sporadic and cancellations of the policies constantly threatened. However, a few days before the fire, a payment was made and the policies were kept in force. The mortgage had been foreclosed and the Liontis given a few days in which to list the property for sale. It was with matters in this state that the building was destroyed. When the insurance companies settled with the mortgagee but refused to make payment to the Liontis, the present suit was started.

Plaintiffs contended that the defendants did not pay their claim because they hoped through a settlement agreement to recoup

from the mortgage company a portion of the money paid to it under the policies' mortgagee clause. Plaintiffs asserted that one of their former employees had a grudge against them and may have been responsible for the fire. In addition, they maintained they had no reason to burn the building and that their financial troubles were largely the result of inadequate records and their inability to understand business practices and the requirements of the tax laws.

Although the defendants' case relied exclusively on circumstantial evidence, it was of more than sufficient volume and weight to justify the finding that the Liontis had set the fire or caused it to be set. In addition, there was nothing to indicate that the jury acted under the influence of any passion or prejudice and no argument was advanced to explain this contention. Simply stated, there was overwhelming evidence that a fire of incendiary origin destroyed a comparatively new business run by inexperienced persons in precarious financial condition. The jury's verdict was justified and no reason has been suggested to set it aside. See generally *Mele v. All-Star Insurance Corp.*, 453 F. Supp. 1338 (E.D. 1978).